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U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: CC Docket No. 92-115

Dear Mr. Caton: DOCKET FILE COPY ORIGINAL

On January 4, 1995, the Office of Advocacy transmitted the enclosed ex parte communication to the Chairman Hundt and the individual Commissioners. Through an oversight, the Office of Adovcacy failed to place the communication in the record pursuant to Commission rules. Please accept this copy of the filing for placement in the docket of CC 92-115.

Sincerely,

Barry Pineles, Esq.
Assistant Chief Counsel

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Honorable Reed Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Dear Chairman Hundt:

On December 19, 1994, a number of petitions for reconsideration were filed in response to the Commission's Report and Order in CC Docket No. 92-115, Revision of Part 22 of the Commission's Rules Governing the Public Mobile Radio Services (September 9, 1994). The Office of Advocacy has reviewed this material and believes that the Commission should grant the petitions for reconsideration to address the very important small business issues raised by the petitioners.

As you know, the Commission issued a notice of proposed rulemaking to revamp the licensing of commercial mobile radio services in 1992. The Office of Advocacy filed extensive comments in response to that notice and our comments focused almost exclusively on efforts to improve the licensing regime for paging operators.[1] The Commission adopted our suggestions that Part 22 applications not be permitted on first come, first serve basis and that multichannel transmitters for paging service be approved. The Office of Advocacy commends the Commission for taking these vital steps in ensuring that only serious and viable candidates are considered for licenses pursuant to Part 22.

In the notice of proposed rulemaking, the Commission offered a potential solution to cellular telephone fraud.[2] According to the Commission, tampering with the cellular telephone's

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[1] Until contacted by small businesses involved in reprogramming cellular telephones, the Office of Advocacy was not aware of the significance of the Commission's action with respect to cellular licensees.

[2] The Office of Adovcacy's support of the petitions for reconsideration in no way condones the use of technology to defraud holders of cellular telephone licenses. Thus, the Office of Advocacy strongly endorses efforts by the Commission and appropriate law enforcement agencies to prosecute, to the full extent of the law, those businesses that reprogram cellular telephony equipment for customers who do not have a valid contract with an appropriate cellular licensee or reseller.

electronic serial number (ESN) has increased the opportunity for theft of cellular telephone service. The proposal found strong support from the cellular telephone industry. However, strong opposition was raised by companies that reprogram cellular telephones to emulate an ESN on another telephone; in essence creating an extension cellular telephone.[3]

The Commission adopted the proposed rule for three reasons. First, the Commission found that simultaneous use of cellular telephone ESNs, without the cellular licensee's permission, could cause problems in some cellular systems such as erroneous tracking or billing. Second, use of ESNs without the licensee's permission could deprive cellular carriers of monthly per telephone revenues to which they are entitled. Third, telephones altered without licensee permission would be tantamount to the use of unlicensed transmitters in violation of § 301 of the Communications Act. An examination of these rationales demonstrates that the Commission is more interested in protecting cellular telephone company revenue than preventing fraud.

First, the Commission cites no evidence that a company like C2+ or one of the many smaller businesses that reprogram ESNs for valid customers of cellular telephone companies is committing fraud, i.e., stealing service for which the reprogrammer's customers are not subscribers to the telephone licensees cellular service. The petitioners have offered to provide a computerized database, if necessary, of their customers to cellular telephone companies to show that only customers with valid cellular contracts are receiving the reprogramming of ESNs. Nothing in the record demonstrates that this option would not be adequate in preventing fraud.[4]

Second, the Commission seems to believe that cellular telephone companies have some unbridled right to revenue. Prohibiting the use of ESN reprogramming would simply ensure that current cellular licensees capture all of the revenue associated with providing one-number cellular telephony to multiple cellular

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[3] As with an extension telephone in the home, two cellular telephones with the same ESN could not be used simultaneously. And two cellular telephones with the same ESN could be not be used to make calls to each other.

[4] Obviously, unscrupulous businesses could reprogram cellular telephones without obtaining evidence of a valid contract between the customer and the cellular telephone company. However, the Commission's prohibition still would not prevent the operation of unscrupulous operations. It would simply make illegal currently legal operations and change law-abiding citizens into criminals by the stroke of the regulators' pen.

telephones.[5] Nothing in the Communications Act mandates that cellular telephone companies are entitled to any specific amount of revenue for use of a public resource.[6]

The Office of Advocacy does not believe that the Commission has stated adequate grounds in support of its prohibition on reprogramming cellular ESNs. The Office of Advocacy believes that the petitioners have raised legitimate issues that need a full reexamination. Furthermore, the petitioners have offered a number of protections to cellular licensees to insure that fraud is kept to a minimum.[7] The Office of Advocacy fully supports the petitioners efforts to maintain their businesses (most of which are relatively small), provide a useful service to many cellular customers, and ensure the existence of competition to cellular licensees in the provision of one-number cellular service.

Sincerely,

Jere W. Glover
Chief Counsel for Advocacy

cc: Honorable Andrew Barrett, Commissioner
Honorable Rachelle Chong, Commissioner
Honorable Susan Ness, Commissioner
Honorable James Quello, Commissioner

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[5] The record is replete with examples of cellular telephone companies offering one number for multiple telephones but with their service the customer would have to pay a monthly charge for the feature.

[6] Unlike their wire-line telephony siblings, cellular telephone companies face direct competition with another cellular telephone provider, resellers of cellular service, and soon, personal communication service providers. The Office of Advocacy does not understand why cellular telephone companies deserve the right to all revenue from one number for multiple cellular telephones when the Commission is trying to increase competition in wireless service.

[7] It would indeed be naive of the Commission to believe that any regulatory regime, including prohibition, would eliminate fraud. That would require a change in human nature -- not even something the Commission appears to have the power to modify.